No. 81-2110

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

UNITED BUILDING AND CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY AND VICINITY,
Appellant,

v.

MAYOR AND COUNCIL OF THE CITY OF CAMDEN AND THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,
Appellees.

APPELLANT'S REPLY BRIEF

On Appeal from the Supreme Court of New Jersey

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PRELIMINARY STATEMENT

The appellant, the United Building and Construction Trades Council of Camden County and Vicinity (hereinafter referred to as "the Council"), seeks review of a judgment of the Supreme Court of New Jersey, reported at 88 N.J. 317, 443 A.2d 148 (1982), which upheld the constitutionality of a resident preference ordinance enacted by the City of Camden, New Jersey. The ordinance required that at least forty per cent of the private employees hired by contractors and sub-contractors engaged in public works construction projects be municipal residents for one year prior to employment. Probable jurisdiction was noted by this Court on March 7, 1983, ____ U.S.____, 103 S. Ct. 1270 (1983).

Recognizing the constitutional infirmity of its enactment, Camden amended its

ordinance in June, 1983, two weeks after appellant filed its brief on the merits in this matter.[1] Although the amended ordinance eliminated the durational residency requirement, it retained the constitutionally repugnant aspect of the ordinance which strikes at the core objective of the Privileges and Immunities Clause to protect out-of-state residents' right to pursue their lawful trades, by continuing to exclude all out-of-state residents from competing for forty per cent of the private jobs offered on public works construction projects.

TERMS OF THE AMENDED ORDINANCE

The amended ordinance provides in pertinent part that "[f]or any 'construction contract' in excess of $50,000.00...40% of the work hours shall be furnished by City

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[1]Appendix to City's Brief at A1-A19 (referred hereafter as "City's App," followed by the page number). "A" followed by the page number, refers to the Appendix

residents." (Sect. 4, §4.1B).[2] This requirement applies "to each and every trade, craft or skill employed to perform the construction contract and shall be reflected throughout the various levels of employment within each trade, craft or skill [and]...in no event shall the total work hours furnished by...City residents be less than the goals established in paragraph 4.1." (Sect. 4, §4.2).[3] For purposes of complying with the ordinance, "total work hours" includes "the number of hours devoted to all tasks customarily performed on a construction site whether or not such tasks are, in fact, performed on the construction site."[4] The ordinance

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attached to appellant's Jurisdictional Statement.

[2]City's App. A-8.

[3]Id.

[4]Id.

encompasses "[a]ny agreement for the erection, repair or alteration of any building structure, bridge, roadway or other improvement to real property which is funded in whole or in part with City funds or funds which the City expends or administers in accordance with the terms of a grant."[5] The term "Resident of the City of Camden" is defined as any person who resides in the City of Camden.[6]

The requirements of the ordinance also apply to sub-contractors and unions. Thus, the ordinance requires a developer/contractor to submit copies of the ordinance to all sub-contractors and "make compliance with it, a specification of all bids." (Sect. 6, §6.1):[7] "Each developer/contractor

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[5]City's App. A-4.

[6]City's App. A-5.

[7]City's App. A-9.

shall be responsible for the performance of its sub-contractors in the implementation of the provisions of the ordinance... [W]henever a developer/contractor sub-contracts a portion of the work on a project, the sub-contractor shall bind the sub-contractor to the obligations contained in this ordinance to the full extent as if he/she were the developer/contractor." (Section 12, §12.1).[8] Whenever a developer/contractor has a referral agreement with a union, the union is obligated to sign a statement to be submitted by a developer/contractor with its bid, indicating the union's awareness of the terms, conditions and goals of the ordinance and the union's commitment to assist the developer/contractor and/or sub-

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[8]City's App. A-18.

contractor to comply with the requirements of the ordinance.[9] A contract will not be awarded and therefore work and referrals will not be available to union members, absent "an acceptable union statement" or adequate explanation for an inability to obtain one.[10]

Taken together, as in the original ordinance, these provisions exclude out-of-state workers from forty per cent of all jobs in a major segment of the construction industry in Camden and mandate that private contractors, as a condition of doing business with the City of Camden, make their employment decisions solely on the basis of an applicant's state of residency, regardless of the individual's unemployment

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[9]City's App. A-17.

[10]City's App. A-18.

status and qualifications. The forty per cent mandate is a minimum requirement and under the terms of the ordinance may permissibly be higher. Thus, an out-of-state resident is excluded from access to a significant segment of private sector employment opportunities regardless of whether he or she is unemployed, a minority, or possesses more skills for the requisite job.

In addition to private contractors, the ordinance applies to the hiring decisions of sub-contractors and to referrals from union hiring halls, despite the fact that neither sub-contractors nor unions have any connection with the City of Camden. The affected individuals are all private employees, whose only connection with the municipality is the location of the job site. The ordinance regulates both the primary relationship between the City

and its public works contractors, as well as the secondary, wholly private relationships between contractors and subcontractors and their employees. The terms of the ordinance encompass all work customarily performed on a construction site, regardless of the location that such tasks are actually completed. The provisions of the ordinance apply to any projects, funded in whole or in part by the City of Camden, or in which the City merely expends or administers the funds, including both public and private projects, as well as (by the City's own admission) to projects using monies obtained through federal grants.[11]

The Camden ordinance represents governmental intrusion into the contractual relationship between private parties, in order to carry out a purpose which is

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[11]City's brief at 5 n.9. Indeed, the ordinance has been applied to federal money obtained to help finance the construction of a nursing home and will be applied to a

plainly protectionist of local economic interests. The City is choosing which persons, among the class of construction workers comprised of both residents and nonresidents, may compete for employment within a certain segment of the private construction industry. Camden, authorized by the State of New Jersey, is seeking to accomplish what the state cannot--the exclusion of out-of-state residents from a significant portion of private employment opportunities.[12]

ARGUMENT

I. APPELLANT'S CHALLENGE TO THE CAMDEN ORDINANCE, WHICH EXCLUDES OUT-OF-STATE RESIDENTS FROM ACCESS TO FORTY PER CENT OF THE JOBS WITH PRIVATE EMPLOYERS ON PUBLIC WORKS CONSTRUCTION PROJECTS,

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transportation terminal financed primarily by the U.S. Department of Transportation and exclusively by non-city funds.

[12]The amended ordinance also includes a "good faith" requirement and eliminates the provision that the ordinance applies to

CONSTITUTES A "CASE OR CONTROVERSY" WHICH THIS COURT HAS JURISDICTION TO ADJUDICATE.

In order to prevent resolution of this controversy, the City in its brief on the merits contends for the first time that the appellant lacks standing, the matter is not ripe for resolution, and the case has been mooted by intervening amendments to the

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"construction of all residential housing of four units or more." (A 55). These changes are constitutionally insignificant, because they do not alter the infirmity of an enactment which excludes out-of-state workers from access to significant employment opportunities merely because of state of residence. Moreover, despite the good faith proviso, the ordinance gives an automatic preference to city residents which is denied to out-of-state residents, and both unions and their members must conform their conduct to the protectionist provisions of the ordinance. Finally, on its face, the ordinance applies to any funds, including federal money, which the City expends or administers (City's App. A-4). Thus, the ordinance still may encompass private residential construction, which is built in whole or in part by grants administered by the City.

ordinance.[13] Contrary to the City's claims, excluding out-of-state residents from access to forty per cent of the public works construction jobs in the City of Camden presents a live controversy, Powell v. McCormack, 395 U.S. 486, 496 (1969), brought by a party with "such a personal stake in the outcome of the controversy as to assure that concrete adverseness ...upon which the court so largely depends..." Baker v. Carr, 369 U.S. 186, 204 (1962), and it constitutes a substantial matter of "sufficient immediacy and reality" to warrant the attention of this Court. Lake Carriers Ass'n v. MacMullan, 406 U.S. 498, 506 (1972); quoting, Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941).

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[13]None of these issues were ever raised previously by the City, either before the New Jersey Appellate Division, New Jersey Supreme Court or in response to appellant's Jurisdictional Statement. In addition,

A. The Substitution of a Continuing Residency Requirement for the Camden Ordinance's Prior Durational Residency Requirement Does Not Moot Appellant's Privileges and Immunities Challenge, Because the City's Ordinance Continues to Exclude Out-Of-State Residents from Access to Forty Per Cent of the Jobs with Private Employers on Public Works Construction Projects within the City.

In its brief, appellee City of Camden contends that the instant case "has largely been mooted," because it changed the definition of residency in the ordinance during the summer of 1983. Formerly defined as a person who had resided in Camden for at least twelve months, a resident is now defined as any person who lives in the City of Camden. With the exception of this change, the ordinance essentially remains intact.

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neither the State nor amicus Department of Public Advocate asserts this position in their papers.

It is well settled that a case only becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Murphy v. Hunt, 455 U.S. 478, 481 (1982). See also United States Parole Commission v. Geraghty, 445 U.S. 388, 396 (1980), quoting Powell v. McCormack, 395 U.S. 486, 496 (1968). The proponent of mootness has the heavy burden of persuasion. United States v. W.T. Grant, 345 U.S. 629, 633 (1953). Moreover, even if one issue is no longer in controversy, this Court on numerous occasions has recognized that the mooting of one issue does not moot an entire case: "Where one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy." Powell, 395 U.S. at 497. Accord, University of Texas v. Camenisch,

451 U.S. 390, 394 (1981); United Public Workers v. Mitchell, 330 U.S. 75, 86-94 (1947).

In the instant case, appellant maintains its interest in the outcome of the controversy. At its core, the ordinance continues to discriminate against union members who are out-of-state residents, by restricting access to forty per cent of the employment opportunities on public works construction projects to Camden residents. The City still seeks to condition employment with private contractors solely on location of residency in Camden, and by thus regulating access to employment, it is regulating wholly private relationships in favor of parochial interests.

Appellant's central argument in this case, its Privileges and Immunities challenge, thus remains untouched by the substitution of a continuing residency

requirement for the durational residency requirement, because the entire focus of this argument rests on the ordinance's distinction between in-state and out-of-state residents. Because the Privileges and Immunities Clause issue is still in controversy, this case is not moot. See Powell, supra and Mitchell, supra. "This, then is simply another instance in which one issue on a case has become moot, but the case as a whole remains alive because other issues have not become moot." University of Texas v. Camenisch, supra. (citations omitted).[14]

Finally, the case of Hicklin v. Orbeck, 437 U.S. 518 (1978) is directly on point and should control this Court's analysis of the mootness question. In that case, appellants challenged on both

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[14]Indeed, in its brief, the City of Camden does not even attempt to claim that the entire controversy is moot, contending instead that this Court should dismiss this

Privileges and Immunities and Equal Protection grounds an Alaskan statute granting an employment preference for residents who had lived in the state for at least a year. Although the Equal Protection Clause issue was moot because the Alaska Court struck down the durational residency requirement under both the state and federal constitutions, this Court held that the entire case was not moot and determined that the residency preference violated the Privileges and Immunities Clause. Id. 523.

Analogously, the case sub judice is not moot, because the ordinance continues

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case allegedly because "a significant, indeed a predominant portion of the case has been mooted." (Appellee's brief at 16). Powell and Mitchell, however, dictate that this Court hear the remaining live issues, despite the City's assertions.

to foreclose out-of-state union members from obtaining access to forty per cent of the private employment opportunities on public works construction projects. Moreover, in Hicklin, as in the instant case, appellant's Privileges and Immunities argument focused on the law's distinction between in-state and out-of-state residents and thus remained unaffected by the mootness of the durational aspect of the challenged statute.

Therefore, appellant's Privileges and Immunities challenge remains unaffected by Camden's amended enactment, because the City persists in its constitutionally repugnant practice of excluding out-of-state workers from access to employment opportunities.

B. There Is No Requirement that a Fact-Finding Hearing Be Held before the Case Is Ripe for Supreme Court Adjudication.

In its brief, appellee City of Camden contends that the absence of a trial-type

hearing in the state courts or before an administrative agency precludes the Supreme Court from reviewing this case. Contrary to appellee's assertions, however, this Court has never held that it can exercise its jurisdiction only if a fact-finding hearing were conducted in the state court.

Indeed, every time that it decides a case resolved in the lower courts on a summary judgment motion, a motion to dismiss for failure to state a claim or a motion for declaratory relief, this Court does not have access to a complete factual record.[15] In such cases, this Court issued rulings because the issues involved were primarily questions of law. Similarly, in the case at bar, the issue is whether Camden's resident preference violates the federal Constitution. Because appellant is

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[15]See, e.g., Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156 (1981); Retail Clerks International Ass'n Local 1625, AFL-CIO v. Schermerhorn, 373

challenging the constitutionality of the ordinance on its face,[16] the absence of a fact-finding hearing in the lower courts is not relevant. Moreover, the New Jersey Supreme Court decision was based on its threshold ruling that the Privileges and Immunities Clause does not apply to local enactments, regardless of the claims alleged (A26).

Furthermore, this Court on numerous occasions has recognized its power to hear federal constitutional claims challenged originally in state court, as long as

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U.S. 746 (1963); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941).

[16]The Supreme Court does examine the lower court record to determine whether expressly or by clear implication the appellant's federal claim was presented in the state system. See, e.g., Webb v. Webb, 451 U.S. 493 (1981); New York Ex Rel. Bryant v. Zimmerman, 278 U.S. 63. It is apparent from the record in this case, which includes the New Jersey Supreme Court opinion, that the state court's decision upholding the residency preference was based entirely on its interpretation of

appellants had exhausted state remedies,[17] and the state court decision was a final judgment rendered by the highest possible court of the state. See, e.g., Flynt v. Ohio, 451 U.S. 619 (1981); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Local No. 438 Construction and General Laborers' Union v. Curry, 371 U.S. 542, 549-551 (1963). The final judgment rule only precludes reviewability when anything further remains to be determined by a state court. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945). In the case sub judice, appellant has exhausted its state remedies by pursuing its case to the highest state court, which rendered a final judgment. Established jurisdictional

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federal rather than state constitutional principles.

[17]Appellant, both before the New Jersey courts as well as before this Court, is seeking judicial review of an administrative decision by the State Treasurer's office to approve Camden's resident pre-

principles dictate that this case is ripe

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ference ordinance. Appellant initiated review of the State Treasurer's approval by filing a Notice of Appeal in the Appellate Division of the Superior Court of New Jersey, which pursuant to New Jersey Court Rule 2:2-3(a)(2) has exclusive jurisdiction to review final decisions or actions of any state administrative agency. See, e.g., Pascucci v. Vagott, 71 N.J. 40, 53 (1976) (and cases cited therein). This matter was subsequently certified by the New Jersey Supreme Court upon its motion pursuant to New Jersey Court Rule 2:12-1.

Thus, appellant has challenged the state administrative approval of the City's ordinance through the precise procedure mandated by New Jersey's Court Rules. The City makes no claim that the challenged state action either does not constitute a final order or that appellant deliberately bypassed any readily available fact-finding forum. Moreover, it is particularly outrageous for the City to object to the lack of a trial type hearing when the City ordinance was approved by the State of New Jersey pursuant to a "closed-door" administrative process which offered no realistic or statutorily mandated opportunity for notice, comment or hearing. Other than the exchange of correspondence and the submission of the ordinance, there were no administrative proceedings prior to the approval of the ordinance. The City's most recent amendments, enacted in June 1983, were approved in a similar fashion.

for review by this Court.

The case of Doremus v. Board of Education of Borough of Hawthorne, 342 U.S. 429 (1952), upon which the City of Camden relies, is inapposite. In Doremus, the Court held that appellant taxpayers did not have standing to challenge the validity of a state statute providing for the reading in school without comment of five verses of the Old Testament, because these taxpayers had not shown any nexus between their taxpayer standing and the challenged conduct.[18] In contrast, the Council is facially challenging a state administrative agency's final action, which precludes appellant's members from access to private employment opportunities. No trial-type hearing is necessary to demonstrate the protectionist nature of the Camden enactment. Moreover,

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[18]Since 1952, this Court has cited Doremus only for the proposition that the federal courts, because of the dictates of the Article III "case or controversy"

the City does not question the fact that the ordinance is presently in operation, thus requiring both out-of-state residents and local unions to conform their conduct to its dictates. According to the City's own statements, the ordinance has impacted favorably upon City residents, by definition thereby adversely effecting out-of-state residents.

Furthermore, unions are not required to wait until their members have actually lost jobs to challenge the City's resident preference. "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is

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requirement, are not bound by state court assessments of the parties' standing in a given case. See State of New Jersey v. Portash, 440 U.S. 450 471 (1979) (Blackmun, J. dissenting); Burns v. Ohio, 360 U.S. 252, 259-260 (1959)(Frankfurter, J., dissenting).

certainly pending that is enough." Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923); see Babbitt v. United Farm Workers, 442 U.S. 289, 298 (1979) (and cases cited therein); Regional Rail Reorganization Act Cases, 419 U.S. 102, 143 (1974). The dispute is neither hypothetical or abstract, but represents a substantial controversy between parties of adverse legal interests ripe for review by this Court.[19]

A decision to the contrary would mean that appellant would have no remaining forum to challenge the Camden ordinance. If this Court dismisses this case because of lack of a factual record or because it is not ripe, neither appellant nor appellee would ever have any further opportunity to develop a record in state court or seek

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[19]Courts have found matters ripe for adjudication in far more speculative circumstances than those involved herein. See, e.g., Babbitt v. United Farm Workers,

further review of the State's action. Such a result would pose an undue hardship on the appellant and would demonstrate that by adopting novel procedures, the state court would ensure that it could insulate its decisions on federal constitutional issues from review.[20]

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supra., 442 U.S. at 299 (failure to invoke Act's election procedure in the past and no stated interest to do so in the future); Epperson v. Arkansas, 393 U.S. 97, 101-102 (1968) (no record of any prosecution in 40 years under the anti-evolution law); Railroad Transfer Service, Inc. v. City of Chicago, 386 U.S. 351 (1967); Brown v. Anderson, 202 F.Supp. 96, 99-100 (D. Alas. 1962) (challenge to Alaskan statute excluding non-residents from fishing in certain areas presented justiciable controversy even though the Act had not yet been applied). Unlike International Longshoremen's Union v. Boyd, 347 U.S. 222 (1954), in which the parties were seeking a declaratory judgement on the constitutionality of a particular statute prior to the conduct having occurred and the challenged construction having been adopted by the federal agency, in the case at bar, the Camden resident preference is already operational and its impact is already being felt.

[20]As the Court stressed some fifty years ago in Nashville, Chattanooga, and St. Louis Railway v. Wallace, 288 U.S. 249

Contrary to appellee's claim, the Camden resident preference is appropriate for adjudication by this Court, and denial of judicial review will impose unwarranted hardship on the appellant.

(1933), satisfying Article III requires concern "not with form, but with substance." Id. 259. Justice Stone concluded that the form or method of procedure by which federal rights are adjudicated in the state courts cannot preclude Supreme Court review so long as the Article III "case or controversy requirement" is met. Id. 264. See also, NAACP v. Alabama, 357 U.S. 449, 457-458 (1958) ("Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those, who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.") Indeed, to restrict appellate review because of the state's purported adoption of novel procedures would undermine this Court's statutorily mandated exercise of jurisdiction to review a state court's decision upholding a state enactment in the face of federal constitutional challenges. 28 U S.C. §1257(2). In the alternative, such a result would mean that this Court would have the power to dictate procedural rules to the state courts.

C. Appellant Has the Requisite Standing to Challenge Camden's Resident Preference Ordinance.

Camden also contends that the appellant lacks the requisite standing to challenge its resident preference, in that there is no evidence of a distinct and palpable injury suffered or immediately threatened which is fairly traceable to the challenged conduct (City's brief at 18). In so contending, the City has misconstrued both appellant's claim and the nature of the injury sustained.

The fundamental focus of the standing inquiry is whether the parties seeking to invoke the Court's jurisdiction have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v.

Carr, supra, 369 U.S. at 204 (1962). Subsequent decisions of this Court have required the party who invokes the Court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) and a "'fairly traceable' causal connection between the claimed injury and the challenged conduct." Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72 (1978) (citations omitted).

Moreover, the standing requirement is not concerned with the degree of injury but rather with the distinction between some injury and none at all. Valley Forge Christian College v. Americans United for Separation of Church and State, supra, 454 U.S. 464, 497 (1982) (Brennan, J.,

dissenting) (citations omitted).

By claiming that appellant lacks standing because it has failed to demonstrate that any out-of-state resident has lost a job, Camden has completely misconstrued the nature of the alleged harm. The gravamen of appellant's claim is that the ordinance on its face discriminates against and thus injures out-of-state residents by denying them access to forty per cent of the private employment jobs on public works construction projects.[21] Moreover, the ordinance imposes specific requirements on the operation of union hiring halls, which contravene existing collective bargaining agreements and subject the noncomplying union to potential liability. Furthermore, hiring halls must sign a statement complying with the ordi-

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[21] See, e.g., University of California Regents v. Bakke, 438 U.S. 265, 280 n.14 (1978) (inability to compete for all one hundred places in medical class constitutes

nance and conform their behavior to the terms of the enactment at the peril of union contractors being precluded from bidding on existing construction projects and union hiring halls being denied referral opportunities which were previously available.

Appellant need not show loss of a job in order to have standing. Rather, as this Court has stressed:

> A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement...But [o]ne does not have to await consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough...(citations omitted).

Babbitt v. United Farm Workers, supra, 442 U.S. at 298.[22] Here, the City of Camden by

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demonstrated injury, regardless of inability to prove admission in the absence of the special program).

[22]Moreover, in this case at least three

the very terms of its ordinance is seeking to promote the welfare of Camden residents, by restricting job opportunities available to out-of-state workers. It is legal sophistry for Camden to enact a protectionist measure to promote jobs for purportedly unemployed city residents at the expense of out-of-state workers and then to argue subsequently that such out-of-state

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factors indicate that the mere threat of loss of a job is sufficient. First, this is a highly specific ordinance clearly directed at out-of-state residents. See Doe v. Bolton, 410 U.S. 179, 187-189 (1973). Second, the Camden ordinance is a recent enactment which the City is presently enforcing and not a law which has lain moribund for years. See Poe v. Ullman, 367 U.S. 497, 501 (1961). Third, because this is a civil rather than criminal statute, it imposes an affirmative duty to comply. "[I]f appell[ants] are now under such an obligation, that in and of itself makes their attack on the validity of the law a live controversy, and not an attempt to obtain an advisory opinion." Lake Carriers Ass'n v. MacMullan, supra, 406 U.S. at 507 (citation omitted).

residents are wholly unaffected by Camden's resident preference.[23]

Surely, the drafter of the Privileges and Immunities Clause, which "plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation..." Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1871), intended that the beneficiaries of their legacy should be able to enforce their protected rights in the courts of

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[23]It should be emphasized that the Council, an unincorporated association, is not a a legal entity apart from its members, see Harker v. McKissock, 12 N.J. 310, 96 A.2d 660 (1953). Moreover, this Court has recognized that an association may initiate litigation as the representative of its members, as long as it alleges that one or more of its members is suffering immediate or threatened injury as a result of the challenged action. See, e.g., Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 342 (1977); Warth v. Seldin, 422 U.S. at 490, 511 (1975); Sierra Club v. Morton, 405 U.S. 727, 739 (1972); National Motor Freight Ass'n v. United

this nation.[24] Standing should not be denied "'to the class for whose sake the constitutional protection is given,'" Jones v. United States, 362 U.S. 257, 261 (1960), quoting New York ex rel. Hatch v. Reardon, 204 U.S. 152, 160 (1907).

II. THE CAMDEN ORDINANCE, WHICH DISCRIMINATES AGAINST OUT-OF-STATE RESIDENTS BY DENYING THEM ACCESS TO A SIGNIFICANT SEGMENT OF PRIVATE EMPLOYMENT OPPORTUNITIES SOLELY BECAUSE OF THEIR STATE OF RESIDENCE VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE.

A. The Camden Resident Preference Is Not Immune From Review under the Privileges and Immunities Clause Because it Is Enacted by a Municipality Rather Than the State.

States, 372 U.S. 246, 247 (1963); NAACP v. Alabama, 357 U.S. 449, 459 (1958). See also Crescent Park Tenants Association v. Realty Equities Corp. of New York, 58 N.J. 98, 275 A.2d 433 (1971), in which the New Jersey Supreme Court also recognized an associations's power to initiate litigation to vindicate the rights of its members.

[24]Indeed, this Court has found standing in cases alleging an injury which is far less distinct and palpable than what has

Consistent with the clear purpose and objectives of the Privileges and Immunities Clause, "it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of

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occurred herein. See, e.g., Bryant v. Yellen, 447 U.S. 352 (1980) (no evidence that individuals would be able to purchase excess lands if statutory provision were applicable); Duke Power Co. v. Carolina Enviromental Study Group, Inc., supra (standing found even though appellants showed only potential environmental and aesthetic consequences resulting from the construction of nuclear power plants); Village of Arlington Heights v. Metropolitan Development Corp., 429 U.S. 252 (1977) (standing found even though developer's project was contingent on ability to procure rezoning, obtain financing and qualify for federal subsidies); Doe v. Bolton, supra, 410 U.S. at 188 (no evidence doctors were prosecuted or threatened with prosecution for violating the State's abortion statute); Jenkins v. McKeithen, 395 U.S. 411 (1969) (plaintiff had standing to attack constitutionality of Labor-Management Commission of Inquiry, even though plaintiff did not allege that he had been or would be called before the Commission).

doing business in State B on terms of substantial equality with the citizens of that State." Toomer v Witsell, 334 U.S. 385, 396 (1948) (footnote omitted). Although the contours of the Privileges and Immunities Clause have not been fully developed, Baldwin v Fish and Game Commission of Montana, 436 U.S. 371, 380 (1978), this Court has consistently held "violative of the Clause state discrimination against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State." Hicklin v Orbeck, 437 U.S. 518, 524 (1978).

Although the Camden resident preference contravenes the promises of interstate equality and non-discrimination which are at the core of the Privileges and Immunities Clause, the New Jersey Supreme Court held, and the appellees contend

(State brief at 21-26) that the Clause does not apply to municipal enactments, such as the Camden ordinance, which "most certainly affect more New Jersey residents not living in Camden than it does out-of-state residents." (A26) Such an approach completely immunizes municipal conduct from Privileges and Immunities Clause scrutiny and effectively nullifies the protection offered out-of-state residents from nondiscriminatory treatment.

Contrary to the New Jersey Supreme Court's unsubstantiated claim, far more out-of-state residents are prejudiced by the Camden enactment than New Jersey citizens. Thus, according to the latest census data, approximately four out of five residents excluded by Camden's ordinance are out-of-state residents.[25] The impact and

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[25]In the SMSA of which Camden is a part, there are 4,716,818 people, of which 3,682,709 are Pennsylvania residents, and 1,034,109 are New Jersey residents.

effect of the Camden ordinance falls primarily on out-of-state residents, who are discriminated against for no other reason "beyond the mere fact that they are citizens of other States." Toomer v Witsell, supra, 334 U.S. at 396.

Moreover, there is nothing in the identity of a municipality, as distinct from a state, which should render its governmental actions any the less subject to federal constitutional protection against invidious discrimination.[26] The pur-

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Excluding the 84,910 Camden residents who receive the benefit of residential preference, 3,682,709 of the 4,631,908 residents who are excluded, or approximately 80 per cent, live outside the State of New Jersey. The exclusionary impact of the ordinance is exacerbated by the fact that, Philadelphia, Pennsylvania, which is the fourth largest city in the country with a population of 1,878,326, is immediately adjacent to Camden. Source: U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, 1980 CENSUS OF HOUSING AND POPULATION.

[26]What this Court has stressed regarding the protections afforded by the Equal Protection Clause of the Fourteenth Amendment applies with equal force to the

poses of the Privileges and Immunities Clause are no less implicated when the discrimination against out-of-state residents is effectuated by means of a municipal ordinance, rather than a state statute.[27] Furthermore, the exclusion effectuated against all non-New Jersey

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Privileges and Immunities Clause, which secures equal protection of the laws for out-of-state residents.

> The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State. 'Thus the prohibitions of the Fourteenth Amendment extend to all actions of the State denying equal protection of the laws; whatever the agency of the state taking the action ...' A city, town or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of law. (citation omitted)

Avery v. Midland County, 390 U.S. 474, 480-481(1968).

[27]Out-of-state residents suffer from the same lack of political access to municipal decisionmaking as they do state government. The absence of political accountability has

residents by the Camden ordinance is not ameliorated or eliminated by the fact that other New Jersey citizens who are not residents of Camden are similarly victimized.

Ironically, both this Court and numerous lower courts have recognized that a state may not limit out-of-state residents' access to private employment opportunities.[28] To hold that city enactments are immune from Privileges and

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long been held held as an important consideration justifying the heightened scrutiny afforded by the Privileges and Immunities Clause. Varat, State "Citizenship" and Interstate Equality, 48 UNIV. OF CHI.L.REV. 487, 517-518 (1981) Since nonresidents are unrepresented in the legislature of the State imposing the exclusion, judicial acquiescence in schemes imposing special burdens upon out-of-state residents would compel them to seek redress through their own state, "but to prevent [retaliation] has one of the chief ends sought to be accomplished by the adoption of the Constitution." Austin v. New Hampshire, 420 U.S. 656, 662-663 (1975) (citation omitted).

[28] See, e.g., Hicklin v. Orbeck, supra; Mullaney v. Anderson, supra; Toomer v. Witsell, supra; Ward v. Maryland, supra. Appellee's reliance on Woodruff v. Parham,

Immunities Clause scrutiny and thereby permit Camden to deny access to all out-of-state residents from a significant portion of private employment opportunities grants the City greater constitutional power than has its parent, the State.[29]

Such a holding not only enables a state to induce indirectly what it cannot command directly, but also encourages every municipality in New Jersey to accomplish that which the state cannot-achievement of an insulated and isolated economic system under which residents of each city in New

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8 Wall 123 (1862) is misplaced. That case involved an objection to a tax on imports from other states. However, that was a uniform tax imposed by the State of Alabama on all sales made within it, whether by citizens of Alabama or citizens of another state. By contrast, in the case sub judice, the Camden ordinance excludes all out-of-state residents, while according an employment preference to all Camden, New Jersey residents.

29 This would occur even though "[o]urs is a 'dual system of government', ...which has no place for sovereign cities." Community Communications Company, Inc. v. City of

Jersey can work in their own city and inhabitants of Delaware and Pennsylvania can work nowhere in New Jersey.[30] The one nation which the Privileges and Immunities clause was designed to create out of "a collection of independent, sovereign" States, Toomer v. Witsell, supra, 334 U.S. at 395, could be just as easily destroyed by independent

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Boulder, 455 U.S. 40, 53 (1982) (citation omitted). As this Court stated long ago.

> All sovereign power 'within the geographical limits of United States' resides either with 'the government of the United States, or [with] the States of the Union. There exists within the broad domain of sovereignty but these two. There may be cities, counties and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these.' (emphasis in original) (citation omitted).

Id. 53-54. Cf., Lincoln County v. Luning, 133 U.S. 529 (1890) (Eleventh Amendment immunity does not extend to state's political subdivision).

[30] Nor is such a possibility either hypothetical or speculative. In 1983 alone, three other governmental entities in New Jersey (Mercer County, Hamilton Township and

municipalities acting to further their own parochial interests as by independent sovereign states.[31]

Rather than encouraging economic welfare, the Camden resident hiring perference will merely foster internecine economic warfare, resulting in the kind of balkanization and conflict among the states which the Privileges and Immunities Clause sought to heal.[32] When a classification

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Atlantic City) have adopted resident preference ordinances on construction projects. (See Appendix A for text). On October 31, 1983, the Atlantic City Mayor vetoed the city's ordinance, stressing in part that action should await the outcome of the case sub judice.

[31]Indeed, the specter of municipalities being "free to make economic choices counseled solely by their own parochial interests," City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389, 408 (1978) and "the serious economic dislocation which could result" Id. 413, has prompted this Court to hold that city enactments are not "state action" immune for review under federal antitrust law. Id; Community Communications Company, Inc. v. City of Boulder, supra.

[32]The degree of retaliation and economic war-

utilizes residency as the sole ground to deny all out-of-state citizens access to private employment, such a legislative distinction must be carefully scrutinized under the Privileges and Immunities Clause, and should not, as the New Jersey Supreme Court held and appellees contend, be exempt from constitutional review merely because some in-state residents are also disadvantaged.

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fare feared by the Framers is fast being realized, as resident hiring preferences imposed upon private contractors are beginning to proliferate. At least twenty-four states presently have some such provision in effect, while four state statutes have been struck down. Maryland has enacted an openly retaliatory measure, which prohibits public works construction employment for any resident of a state whose laws prohibit the employment of Maryland residents. Md.Ann. Code, Art. 21, §8-503 (1981). Note, Construction Worker Residency Requirements: A Constitutional Response, 17 NEW ENG. L.REV. 461 n.3 (1982).

B. The Fact That Camden's Exclusion of Out-of-State Residents from Access to Employment Opportunities May Not Violate the Dormant Commerce Clause Does Not Immunize the Resident Preference from Scrutiny under the Privileges and Immunities Clause.

The City contends that this Court's recent decision in White v Massachusetts Council of Construction Employees, ___U.S.___, 103 S.Ct. 1042 (1983), which upheld on Commerce Clause grounds a Boston executive order requiring at least half of the work force on city funded construction projects to be bona fide city residents because the city was acting merely as a market participant, requires the same determination as to appellant's Privileges and Immunities challenge herein (City's Brief at 19-21).

But the Privileges and Immunities Clause is not the Commerce Clause twice stated in the Constitution. Appellees

completely ignore the vital difference between the two provisions. Unlike the Commerce Clause, which is essentially Congress' Clause, with an implied restraint on state action, the Privileges and Immunities Clause is a charter of personal rights, imposing a direct limitation on governmental action.

Moreover, unlike in White, in which the Court found that under the Commerce Clause, Congress may "affirmatively permit the type of parochial favoritism" expressed in resident preference enactmants, Id. at 1047, Congress is powerless to authorize state discriminations that otherwise violate the Privileges and Immunities Clause.[33] Contrary to the City's claims and as the City admits elsewhere in its brief, the ordinance applies to federal money

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[33]Nor is Camden's ordinance in harmony with Congressional enactments. Thus, pursuant to 49 U.S.C. §1602(a)2(c) (1983), which provides for grants or loans to state and

(City's brief at 5n.9). Indeed, the ordinance will be applied to a transportation terminal, the largest project to come under

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local public agencies from the Urban Mass Transportation Administration (the agency supplying funds for Camden's Transportation terminal): "No grant or loans funds shall...be used to support procurements utilizing exclusionary or discriminatory specifications." In an opinion letter dated October 11, 1983, Chief Counsel of UMTA stated that Alaska's local employment preference statute violated 49 U.S.C. §1602(a)(2)(c) and nothing in White compelled a contrary conclusion) (For a copy of the opinion, see Appendix B, A-12, attached hereto). Similarly, the Department of Transportation regulations promulgated by the Federal Highway Administration mandate:

> (b) No procedure or requirements shall be imposed by any State which will operate to discriminate against the employment of labor from any other State, possession or territory of the United States, in the construction of a federal aid project. The selection of labor to be employed by the contractor on any Federal aid project shall be of his own choosing.

23 C.F.R. §635.124 (b)(1983)(emphasis added).

the ordinance to date, which will be built primarily with federal funds, and exclusively with non-City funds.

Unlike the Commerce Clause, which is textually linked to an affirmative grant of power to Congress, the Privileges and Immunities Clause imposes a direct limitation on the power of state governments to discriminate against out-of-state residents. Thus, in an analogous situation in Katzenbach v. Morgan, 384 U.S. 641 (1966), in which this Court held that, the Fourteenth Amendment's express grant of congressional enforcement power allowed congressional imposition of greater restraints on state discrimination, the Court expressly denied any congressional power "to restrict, abrogate, or dilute [the Amendment's equality] guarantees." Id. 651 n.10. Certainly, the interstate equality guarantee of Article IV, §2

likewise is immune from congressional abrogation.[34]

The underlying vision and promise of the Privileges and Immunities Clause is frustrated, regardless of whether the exclusion of out-of-state residents from access to private employment construction jobs occurs on projects funded solely by the City on projects funded in whole or in part with federal revenues.

C. Camden's Exclusion of Nonresidents from Forty Per Cent of the Jobs with Private Employers on Public Works Construction Projects Fails to Pass Scrutiny under the Privileges and Immunities Clause, Because There Is No Evidence That Nonresidents Constitute a "Peculiar Source of the Evil" at Which the Ordinance Is Aimed and That the Discrimination Practiced Bears a Substantial Relationship to the Evil That the Out-of-State Residents Are Said to Present.

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[34]Although the issue has never been formally addressed by this Court, Professor Tribe, who was counsel for the City of Boston in

Although it is well established that the Privileges and Immunities Clause limits a state's power to bias private employment opportunities in favor of its own residents at the expense of out-of-state residents, Hicklin v Orbeck, supra, 437 U.S. at 525, the appellees conveniently ignore the specific two-pronged test established by this

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White, has stressed that congressional power to consent to discrimination against interstate commerce under the commerce clause

> cannot properly be extended to a conclusion that Congress has limitless power to authorize state discrimination against out-of-state citizens. The privileges and immunities clause of Article IV, §2, for example, confers a personal right against state action unjustifiably discriminating against out-of-state citizens whether or not such discrimination is congressionally authorized.

L.TRIBE, AMERICAN CONSTITUTIONAL LAW §6-31, at 403 n.18 (emphasis in original). See, also, Varat, State "Citizenship" and Interstate Equality, supra, 48 UNIV. OF CHIC. L. REV. at 568-571.

Court to scrutinize violations of the Clause. The State has not satisfied its burden of proving that nonresidents "constitute a peculiar source of the evil at which the statute is aimed" and that the discrimination worked against nonresidents bears "a substantial relationship to the particular 'evil' they are said to present." Hicklin v. Orbeck, supra, at 526, 527.

Camden offers no evidence that nonresidents have either caused or exacerbated the City's unemployment problems. Moreover, even if nonresidents can somehow be shown to be a "peculiar source of the evil," there is no "substantial relationship" between the interest served and the discrimination practiced. The Camden ordinance does not draw its preference in terms of "unemployed residents," but instead only in terms of Camden resi-

dents. The ordinance provides an across-the-board blanket preference to all City residents, whether employed or unemployed and disadvantages all out-of-state residents, regardless of their own economic hardship.[35] Such an untargeted employment preference was considered by the Hicklin Court to belie the stated purpose of alleviating unemployment, Id. 527-528.

Implicitly conceding that the enactment cannot pass constitutional muster under the established Privileges and Immunities test, the City devises a new standard, seeking to justify its resident preference on the grounds that it is a "reasonable response to gravely pressing local needs." (City brief at 23). Neither reasonable nor limited, the ordinance applies to all public works construction

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[35]Nor can Camden justify its resident preference as furthering affirmative action. The ordinance's minority hiring provision is completely unaffected by the challenge

projects, whether built with funds locally generated or funded entirely from federal or state sources which the City administers. It applies regardless of the situs of the work. It imposes hiring restrictions not on municipal employees, but on wholly private parties and seeks to bias the private employment relationships and referral decisions of sub-contractors and union hiring halls who have no direct

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to the City's resident preference. Moreover, the ordinance may very well have adverse consequences on minority unemployment. In 1981, black unemployment in the City of Philadelphia was 21.2 per cent, 50,000 black Philadelphians were out of work. U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, GEO. PROFILE OF EMPLOYMENT AND UNEMPLOYMENT, 1981 BULLETIN 2156 (Dec. 1982). Thus, there are more Black Philadelphia residents who are unemployed than Camdens total Black population. Moreover, the total Black population in Philadelphia of approximately 638,878, is about eight times the total Camden population. Source: U.S. COMMERCE DEPARTMENT, BUREAU OF THE CENSUS, 1980 CENSUS OF HOUSING AND POPULATION.

relationship with the City whatsoever. Unlike Toomer and Mullaney, in which the affected out-of-state residents merely paid a higher license fee to engage in their chosen occupation, here the out-of-state residents are absolutely excluded from a significant segment of private employment opportunities. Moreover, this ordinance involves not the direct distribution of state resources to residents, but rather an attempt by Camden to use its immense leverage of access to resources in order to bias private relationships towards parochial interests.

In seeking to impose its resident hiring preference on wholly private parties, appellees ignore the heretofore dispositive significance of the distinction between a city setting the terms and conditions of employment of the city's employees and a city determining how a pri-

vate employer will set the terms and conditions of employment of that private employer's employees.[36] All of the affected individuals are private employees,[37] and

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[36]Thus, in an analogous situation this Court stressed:

> [The National League of Cities Court] began by drawing a sharp distinction between congressional regulation of private persons and business 'necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside,'...and federal regulation-'directed not to private citizens, but to the States as States'... As to the former, we found no Tenth Amendment impediment to congressional action. (citations omitted).

Hodel v. Virginia Surface Mining and Reclamation Ass'n., 452 U.S. 264, 286 (1981). Accord, United Transportation Union v. Long Island Railroad Co., 455 U.S. 678 (1982); National League of Cities v. Usery, 426 U.S. 833 (1976). Moreover, striking down a municipal restriction on the hiring decisions of private employers is neither interfering with "matters that are indisputably 'attribute[s] of state sovereignty'"...or "directly impair [a municipality's ability] 'to structure integral operations in areas of traditional governmental functions'"...(citations omitted). Hodel, 452 U.S. at 288.

[37]None of the effected employees can be con-

contrary to appellees' supposition, state and local governments do not have "plenary authority" unrestrained by the Constitution to determine the basis on which private entities treat their employees.[38]

Camden is certainly not precluded from "serv[ing] as [a] laborator[y] for the development of new social, economic and political ideas" for solving pressing local problems. Federal Energy Regulatory Comm. v. Miss., _____U.S._____102 U.S. Ct. 2126, 2152(1982) (O'Connor, J., dissenting). But in so doing, it may not,

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sidered public employees. The city does not hire them, fire them, pay them, set terms or conditions of employment or negotiate with them or their representatives about their employment. Certainly, neither the actions of these contractors or their employees would constitute state action. Blum v. Yarestsky, _____ U.S._____, 102 S. Ct. 2777 (1982).

[38]Thus, for example, whereas under National League of Cities, municipal employees are not subject to the provisions of the Fair Labor Standards Act, if those employees are hired by private employer contracting with the City to per-

as it has done here, adopt means which are repugnant to the very ideals upon which our Constitution was drafted. Although Camden has wide discretion to enact its programs, the City's discretion ends where Constitutional violations begin. Moreover, in seeking to solve its ills by exporting the problem of unemployment, Camden has adopted a solution heretofore not permitted by the federal Constitution.[39]

In the coming decades, the nation's states and cities will be forced to struggle with scarce resources and regional conflicts. Let the Camden resident preference receive the dignity of constitutional benediction, and America will be

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form the same tasks, provisions of the Fair Labor Standards Act apply and the Tenth Amendment does not insulate municipal conduct from constitutional scrutiny.

[39] Edwards v. California, 314 U.S. 160 (1941). Cf. Shelly v. Kraemer, 334 U.S. 1, 22 (1948) ("Equal protection of the laws is not achieved through indiscriminate imposition of inequalities").

converted into a multitude of isolated and separate enclaves, each pursuing its own parochial self-interest. The Privileges and Immunities Clause is no fair weather protection against discrimination. Its operation has never been limited to times of economic security when there is no pressure upon governmental entities to curtail economic opportunity.

> Let such an exception be admitted and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief list or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was formed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

Baldwin v G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

CONCLUSION

For the foregoing reasons, appellant respectfully urges that the judgment of the New Jersey Supreme Court be reversed and the Camden resident preference be declared unconstitutional.

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APPENDIX A

The following three enactments were all adopted by various governmental entities in New Jersey since passage of the Camden resident preference.

EXECUTIVE ORDER #83-1

WHEREAS, there are many projects publicly bid by this County from time to time involving the construction, renovation, maintenance or repair of buildings, roads and bridges, as well as numerous other projects involving the utilization of construction firms; and,

WHEREAS, it is important and necessary to the residents and taxpayers of this County that, as far as practicable and permitted by law, such projects as outlined above should be carried out by residents, companies or firms located within the County; and,

WHEREAS, it is in the public interest

to amend and change the present job specifications for bidding purposes on the types of Projects outlined above to require that at least fifty percent (50%) of the employees or workers to be utilized on such jobs be residents of this County;

NOW, THEREFORE, BE IT RESOLVED, by the powers vested in me as County Executive of the County of Mercer, I hereby ORDER that a requirement be placed in the current bid specifications in Projects relating to the construction, renovation, maintenance or repair of County buildings, roads or bridges and similar tasks that would notify prospective bidders that at least fifty percent (50%) of the personnel to be utilized on such jobs be residents of the County of Mercer; and,

BE IT FURTHER RESOLVED, that copies of this policy be forwarded to the Board of Chosen Freeholders, Director of the

Division of Purchasing, Director of the Department of Public Works, and the County Engineer.

Dated: February 2, 1983

/s/
BILL MATHESIUS,
MERCER COUNTY EXECUTIVE

EXECUTIVE ORDER

WHEREAS, there are many projects publicly bid by this Township from time to time involving the construction, maintenance, or repair of buildings, roads and bridges, as well as numerous other projects involving the utilization of construction firms, and

WHEREAS, it is important and necessary to the residents and taxpayers of this Township that, as far as practicable and permitted by law, such projects as outlined above should be carried out by residents, companies or firms located within the Township, and

WHEREAS, it is in the public interest to amend and change the present job specifications for bidding purposes on the types of projects outlined above to require at least fifty percent (50%) of the employees

or workers to be utilized on such jobs be residents of this Township;

NOW, THEREFORE, by the powers vested in me as Mayor of the Township of Hamilton, I hereby ORDER that from this date forward, all specifications for bid contain a requirement that residency within the Township be considered in award of bid; and in all bids for construction and/or building, the contractor shall make every effort to employ persons residing within the Township, then within the County, but in no event shall less than fifty percent (50%) of the entire labor force be residents of the Township and County in the aggregate.

/s/
JOHN K. RAFFERTY
MAYOR

DATED: 7/19/83

ORDINANCE

OF THE

CITY OF ATLANTIC CITY, N.J.

AN ORDINANCE to provide for the employment of residents on construction projects funded in whole or in part by City Funds or funds which in accordance with a Federal Grant the City expends or administers; and

WHEREAS, it is in the vital policy interest of the City of Atlantic City to promote the employment of its residents in construction projects funded by City Funds or Federal Funds which in accordance with the grant the City administers said funds; and

WHEREAS, requiring that certain construction contracts be performed with the use of City Residents will result in greater economic benefits to the City

flowing from local expenditures of residents salaries.

NOW, THEREFORE, the Council of the City of Atlantic City does Ordain:

Section 1 - DEFINITION OF BONA FIDE RESIDENT:

Bona Fide Resident is a person having a permanent domicile within the City and one which has not been adopted with the intention of again taking up or claiming a previous residence acquired outside the City.

Section 2 - DEFINITION OF DEVELOPER/ CONTRACTOR:

Developer/Contractor means any party performing or offering to perform a contract for any construction project to which this Ordinance applies.

Section 3 - REQUIREMENT TO USE BONA FIDE CITY RESIDENTS:

On any construction project funded in whole or in part by City

funds, or funds which in accordance with a Federal Grant or otherwise, the City expends or administers, and to which the City is a signatory to the construction contract, the worker hours on a craft by craft basis shall be performed at least fifty (50%) percent by bona fide Atlantic City residents. The requirement of this paragraph shall be material provision of the contract.

Section 4 - **DEVELOPER/CONTRACTOR'S CONTRACTING OBLIGATIONS:**

The Developer/Contractor to whom this Ordinance is applicable, shall submit to all contractors and subcontractors copies of this Ordinance and shall make compliance with it, a specification of all bids. The Developer/Contractor shall require that by submitting a bid, a contractor

or sub-contractor certifies that he/she shall comply with the requirements of this Ordinance.

Section 5 - NON-COMPLIANCE:

Compliance with the provisions of this Ordinance shall be monitored by the Office of Affirmative Action in the Department of Administration. The Office of Affirmative Action in the Department of Administration shall adopt appropriate Rules and Regulations to enforce and monitor the provisions of this Ordinance, including appropriate Rules and Regulations granting waivers from the provisions of this Ordinance in those situations in which after a good faith effort at compliance with this Ordinance, by a Developer/Contractor, compliance is impractical, impossible

or unreasonable. All such Rules and Regulations promulgated hereunder shall become effective upon filing same with the Municipal Clerk. Failure of a Contractor/Developer to comply with the provisions of this Ordinance or any Rule or Regulation promulgated hereunder, may lead to the following sanctions:

(a). Withhold contract or grant payments.

(b). Recommend termination or suspension of the contracts in whole or in part to the City Council.

(c). Those sanctions imposed by Rules and Regulations duly adopted pursuant to this Ordinance.

(d). Take all other actions available at Law or in

Equity for the Breach of a Material Condition of a Contract.

Section 6 - REPEALER:

All Ordinances or parts of Ordinances inconsistent with any of the terms of this Ordinance are hereby repealed to the extent of such inconsistency or inconsistencies.

Section 7 - EFFECTIVE DATE:

This Ordinance shall take effect as provided by Law upon its final passage and publication.

Adopted on second and final reading on October 19, 1983.

APPENDIX B

(opinion of UMTA Chief Counsel delcaring Alaska's resident preference violative of 49 U.S.C. §16029(a)(2)(c))

400 7th Street S.W.
Washington, D.C. 20590

U.S. DEPARTMENT OF TRANSPORTATION

Headquarters

URBAN MASS TRANSPORTATION ADMINISTRATION

OCTOBER 11, 1983

Ms. Jan De Young
Assistant Attorney General
1031 West 4th Street, Suite 200
Anchorage, Alaska 99501

Dear Ms. De Young:

This is in response to your request to Mr. Edward Gill of my staff for a clarification of the Urban Mass Transportation Administration's (UMTA) position vis a vis State laws which give a preference to State residents in contracts funded in part by UMTA.

Alaska's local employment preference statute, 36.10.010, appears to be in conflict with section 3(a)(2)(C) of the Urban Mass Transportation Act of 1964, as amended, (49 U.S.C. §1602(a)(2)(C)) (UMT Act). Section 3(a)(2)(C), which is contained in both the Standard Urban Mass Transportaion

Agreement, Part II, Terms and Conditions and in UMTA Circular 4220.1A, provides that Federal grant funds shall not be used "to support procurements utilizing exclusionary or discriminatory specifications."

It has been UMTA's longstanding position that local preference provisions constitute exclusionary or discriminatory requirements. A separate Alaska statute, 36.10.040, provides that the local preference requirements may not be enforced in a manner that conflicts with Federal statutory prohibition of preferences or discrimination among United States citizens. Alaska statute 36.10.040 is applicable, since enforcement of Alaska statute 36.10.010 conflicts with section 3(a)(2)(C) of the UMT Act.

The recent opinion of the United States Supreme Court in White v. Massachusetts Council of Construction Employers, Inc., ____U.S.____, 51 U.S.L.W. 4211, 103 S.Ct. _____ (1983) does not provide a basis for allowing local preferences under an UMTA funded project. In White the Court upheld a local employment preference executive order issued by the Mayor of Boston. That order applied to both federally funded and locally funded construction projects. Only the Court's analysis regarding federally funded projects is pertinent here. The Court upheld the local preference requirement, since the Federal grant programs which were affected by the Boston order "affirmatively permit the type of parochial favoritism expressed in the order." The construction projects involved in White were funded under Urban Development Action Grants (UDAGs), Community Development Block Grants (CDBGs) and Economic Development Administration Grants (EDAGs). The imple-

menting regulations under UDAG, CDBG and EDAG, unlike the UMTA requirements, either encourage or require local employment preferences.

On the other hand, section 3(a)(2)(C) of the UMT Act and UMTA Circular 4220.1A expressly prohibit discriminatory or exclusionary specifications. The White opinion upholds local preference requirements in federally funded projects when the applicable Federal law affirmatively sanctions local preference requirements. However, White does not establish that local preference requirements will be upheld in federally funded projects when the applicable Federal law either prohibits or is silent in regard to local prefence requirements. The parties in White had stipulated that Boston's local preference order applied to Department of Transportation (DOT) funded projects. However, the Court noted that nothing in the record indicated that DOT funds were involved. Therefore, White was decided as though DOT funds were not involved.

In addition to the prohibitions of section 3(a)(2)(C) concerning discriminatory specifications, section 165(d) of the Surface Transportation Assistance Act of 1982 (Pub. L. 97-424) specifically provides that State buy America or buy national requirements that are more restrictive than the Federal Buy America requirements governing mass transportation procurements (Sec. 165(a)-(c) of Pub. L. 97-424) are not only permitted, but must be given deference by UMTA. The statutory provision only allows a State to impose a stricter buy national provision, and does not allow a State to impose a buy State or buy local provision on a procurement utilizing UMTA funds.

It should be noted that since Fiscal Year 1981, Congress has directed UMTA to give deference to State buy national requirements. The Conference Report for the DOT and related Agencies Appropriations Act for Fiscal Year 1981 (House Report No. 96-1400 (September 25, 1980) pp. 16-17) however, specifically states that "[t]he conferees do not intend the term 'State domestic preference law' (as used in the Appropriations Act) to include so-called 'buy - State laws' which require preferences for products manufactured in a particular State or subdivision and any such State laws shall not prevail over Federal law."

It is our opinion that enforcement of Alaska statute 36.10.010 in an UMTA funded project would directly conflict with §3(a)(2)(C) of the Urban Mass Transportation Act. Furthermore, the White decision does not provide any basis for enforcing local preferences in an UMTA funded project. Therefore, enforcement of the Alaska local preference statute could seriously jeopardize Federal participation in these projects.

Sincerely,

G. Kent Woodman
Chief Counsel

URBAN MASS TRANSPORTATION ADMINISTRATION
UCC-1:SBLUM:&EGILL:syw10-6-83:X6403
cc: UCC Subject File/UCC Chron/UCC-1 Chron/UCC-5 Chron/UCC-1/Blum Chron/UGM-30/URO-10 UMTA File (Return)

The Alaskan statute of §36.10.010 reads:

> Sec. 36.10.010. Employment preference. In the performance of contracts let by the state or a political subdivision of the state for construction, repair, preliminary surveys, engineering studies, consulting, maintenance work or any other retention of services necessary to complete any given project, 95 per cent residents shall be employed where they are available and qualified. If 10 or fewer persons are employed under the contract, then 90 per cent residents shall be employed where they are available and qualified. In all cases of public works projects, preference shall be given to residents. (§ 1a ch 177 SLA 1960; am §11 ch 142 SLA 1972; am §1 ch 208 SLA 1972).

Effect of amendments. - The first 1972 amendment substituted "or a political subdivision of the state" for "boroughs, cities and school districts" in the first sentence.

The second 1972 amendment, in the first sentence, substituted "consulting" for "or" and inserted "or any other retention of services necessary to complete any given project."

Am. Jur. reference. -43 Am. Jur. Public Works and Contracts, § 128.